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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,	
Plaintiff and Respondent,	**A131897**
v.	
KENTWAN D. HAWKINS,	**(Alameda County Super. Ct. No. H48639)**
Defendant and Appellant.	

Defendant Kentwan D. Hawkins (appellant) appeals his conviction by jury trial of the first degree murder of Joshua Ligons (Pen. Code, § 187, subd. (a))[1] (count 1) and the assault of Chuni Kaboo with a firearm (§ 245, subd. (a)(2)) (count 3).[2] As to count 1 the jury found that appellant personally discharged a firearm causing great bodily injury and death.[3] He was sentenced to 50 years to life in state prison. Appellant contends on

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[1] All undesignated section references are to the Penal Code.

[2] At the close of evidence, the court dismissed a count 2 charge of the attempted murder of Kaboo.

[3] As to the count 1 murder charge, the information alleged, in relevant part, that appellant personally and intentionally discharged a firearm causing great bodily injury and death to Ligons pursuant to sections 12022.7, subdivision (a) and 12022.53, subdivision (d). The jury's written verdict states it found appellant personally and intentionally discharged a firearm causing great bodily injury and death to Ligons. At the sentencing hearing, the court imposed a consecutive 25-years-to-life term on the "personal [firearm] use clause" attached to count 1. The court's minute order from the

appeal that he received inadequate notice of the count 3 assault with a firearm charge and the court erroneously admitted hearsay evidence regarding that count. We reject the contentions and affirm.

BACKGROUND[4]

Around noon on October 13, 2008, at the Hayward Bay Area Rapid Transit (BART) station, appellant argued with Ligons, pulled out a gun, and fired a single shot, killing him.[5] A second victim, Chuni Kaboo, was grazed by the bullet after it passed through Ligons. Around 12:45 p.m., appellant went to the home of Jeff Patterson, told Patterson he had just shot a "Blood" at the Hayward BART station and asked Patterson to wipe off the gun and "get rid of it." Patterson wiped off the gun and threw it over a fence into his grandmother's backyard. He later led police to the gun.

DISCUSSION

I. *Appellant Had Adequate Notice of the Count 3 Assault with a Firearm Charge*

Appellant contends he received inadequate notice of the count 3 charge of assault of Kaboo with a firearm and, therefore, the court erred in denying his section 1118.1 motion for acquittal of that count. He argues the error deprived him of his constitutional rights to due process, counsel, and confrontation, and is subject to reversal per se. Alternatively, he argues the error is not harmless beyond a reasonable doubt.

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sentencing hearing states the consecutive 25-years-to-life term on count 1 was imposed pursuant to section 12022.5, subdivision (a). The abstract of judgment states that a consecutive 25-years-to-life sentence was imposed pursuant to section 12022.53, subdivision (b). Section 12022.53, subdivision (d) provides, inter alia, for a consecutive 25-years-to-life term for a person who, in the commission of murder, "personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, to any person other than an accomplice." Since the jury expressly found appellant personally and intentionally discharged a firearm causing great bodily injury and death, the sentencing order and abstract of judgment should be corrected to reflect that the firearm enhancement was found true and imposed pursuant to section 12022.53, subdivision (d).

[4] Since appellant has not raised any claim of error as to the murder conviction and accompanying firearm enhancement, the facts related thereto are briefly summarized.

[5] The parties stipulated that if called as a witness, the forensic pathologist would testify that Ligons died from a gunshot wound to the torso.

Count 3 of the information filed on April 22, 2010, alleged that on October 13, 2008, appellant committed assault of Kaboo with a firearm. At the commencement of trial on January 31, 2011, Kaboo was listed as a potential prosecution witness in the People's case-in-chief. The prosecutor did not mention count 3 in his February 22, 2011 opening statement and elicited no evidence as to that count on direct examination of BART police detective and lead investigator Michael Maes. During defense counsel's cross-examination of Maes, the following colloquy occurred:

"[DEFENSE COUNSEL]: And information that you had was that the gunshot was fired from somewhere at the top, the street level, down into the paved area or the flat area down there; is that correct?

"[MAES]: That's hard to say, because a witness indicated that the victim was backing up, so he would have been backing towards the stairwell. And then another individual was actually struck by the bullet, [as] he was coming up the stairs. And then the victim had an entry wound in the front that was above the exit wound in the back. So there was some theory that maybe it was fired at a downward angle. I can't say that the victim was in the stairwell, but it's possible."

On redirect examination by the prosecutor, Maes testified he identified the second victim coming up the stairs as Kaboo. Over a "speculation" objection, the prosecutor asked Maes why he called Kaboo a victim. Maes responded, "He was a secondary victim . . . in my opinion, an unintended target. The bullet went through the first victim and grazed this individual coming up the stairs." Maes said Kaboo appeared to be in his 70's, and when Maes interviewed him, he was holding his side and receiving medical attention.

Later, after the prosecution rested its case and the court dismissed count 2, the court asked the prosecutor about count 3. The prosecutor argued there was evidence to support that count. Thereafter, the following colloquy occurred:

"[DEFENSE COUNSEL]: [A]s to count 3, I would be making an 1118 motion on that since it's not dismissed. The evidence which came totally out of the blue to me was that it was the officer's understanding that there was a second person. Nobody testified that they saw that person being shot. He had a wound to his left side. All of that was

information that he didn't observe, that was conveyed to him from other sources, and therefore it's my belief it should not be admitted for the truth of the matter asserted.

"[THE PROSECUTOR]: My position is, when the testimony was elicited and [defense counsel] may disagree that it was, in fact, elicited, the reality is there was a question posed. The officer testified to the facts relating to Mr. Kaboo. In all honesty, I informed [defense counsel] and the court that I intended to dismiss the charges as it related to Mr. Kaboo because Mr. Kaboo is in and out of the country, he's over 80 years old, and he made it very clear he was not coming.[6] [¶] That being said, it wasn't as part of anything I did that this testimony was elicited. The officer testified to the facts relating to the shooting, where he was injured and observing him to be injured, including that the bullet had basically grazed his side. That evidence was elicited and came in for the truth of the matter asserted. There was no limitation on the evidence. [¶] If [defense counsel] wants to argue to the jury that that evidence is insufficient, that's his right. But as far as the evidence being admitted, is it the best evidence? No. But it clearly is evidence that this man suffered an assault. The testimony was that the victim was backing away; he was shot; the bullet traveled through, down, and in a downward trajectory through the victim's body, out of his back and struck Mr. Kaboo. That was the evidence that came out. [¶] So it's my position that since the evidence was elicited on cross, since there was no limiting instruction as to that evidence as it came out, it is in for the truth of the matter asserted, and that's enough evidence for a jury to consider.

"[DEFENSE COUNSEL]: And my position is the officer testified, as I understand it, it's not information that he witnessed. It's not that I would ask the court to instruct the

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6 Aside from the prosecutor's statement, the record before us does not contain evidence of the prosecutor's notice to the court and defense counsel of his intent to dismiss the count 3 assault with a firearm charge. The most reasonable reading of the prosecutor's statement is that he intended, at the close of his case, to dismiss the count 3 charge relating to Kaboo due to an anticipated lack of evidence. Regardless of what the prosecutor meant when he announced an intention to dismiss in the future, the fact is count 3 was never dismissed.

jury that that information is limited, just to explain his answer to the question that was asked, but it truly didn't call for that response."

After the court denied the motion for acquittal, the following colloquy occurred:

"[DEFENSE COUNSEL]: . . . I understand the court has already ruled, but what that does when an officer, in my view, gratuitously volunteers information that's not called for by the question, the defense is put to the burden of objecting and raising hell at that point and thus drawing attention to it or letting it go by and then making a motion later to cure that.

"[THE COURT]: You can object and you can ask for side bar always.

"DEFENSE COUNSEL]: I understand that, but when you object to it coming out, the jury notices it.

"[THE COURT]: I'm not certain they always note that depending on who is awake and who is not depending on what their focus is. You're never precluded from objecting, but it was a question as in response to a question asked on cross-examination as a follow-up. [¶] To that extent, your objection was noted, [defense counsel], and . . . I think there's enough there to go to the jury based upon the testimony of the officer. So the motion is denied."

During closing argument the prosecutor argued the evidence established the elements of assault with a firearm.

" 'It is a fundamental principle of due process that "one accused of a crime must be 'informed of the nature and cause of the accusation.' [Citation.]" [Citation.] This requirement is satisfied when the accused is advised of the charges against him so that he has a reasonable opportunity to prepare and present a defense and is not taken by surprise by the evidence offered at trial. [Citations.]' [Citation.]" (*People v. Peyton* (2009) 176 Cal.App.4th 642, 657.) "Whether defendant received constitutionally adequate notice that the prosecution was relying on a particular theory of guilt entails a resolution of a mixed question of law and fact . . . . As such, we undertake an independent review. [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1205.)

Appellant concedes the information provided him notice of the count 3 assault charge. However, he argues this notice was withdrawn when the prosecutor informed defense counsel and the court of his intent to dismiss the assault charge due to the unavailability of Kaboo as a trial witness. In reliance on *Sheppard v. Rees* (9th Cir. 1989) 909 F.2d 1234 (*Sheppard*), appellant argues the prosecutor's statement of intent to dismiss the count 3 charge affirmatively misled him regarding the charges he was facing and "eliminated [the] adversarial testing of the charge."

In *Sheppard*, the defendant was charged with murder and use of a firearm. The case was tried on the theory the killing was premeditated and deliberate, resulting from a cocaine debt the defendant believed the decedent owed him. After both sides rested and the jury instructions were settled, the prosecution raised, for the first time, the theory of robbery/felony murder and requested instructions on that theory in addition to those on first degree murder. Over the defense counsel's objection, the court instructed the jury on felony murder and the prosecution argued that theory during closing argument. The jury convicted the defendant of first degree murder with firearm use, without indicating on which theory it relied. (*Sheppard, supra,* 909 F.2d at pp. 1235-1236.) On appeal, the defendant argued that, because felony murder and the underlying robbery charge were not listed in the information, he did not receive adequate notice to prepare a defense to the felony murder theory. (*Id.* at p. 1236.) The People conceded the defendant had inadequate notice of the felony murder theory; the sole issue on appeal was whether the error was subject to a harmless error analysis. The Ninth Circuit reversed and concluded the error was not subject to harmless error analysis. (*Id.* at pp. 1237-1238.)

Subsequent Ninth Circuit authority has described the holding in *Sheppard* as "narrow." (See *People v. Ardoin* (2011) 196 Cal.App.4th 102, 132, fn. 12 (*Ardoin*), citing *Morrison v. Estelle* (9th Cir. 1992) 981 F.2d 425, 428.) "[*Sheppard*] is limited to the particular instance where the prosecution specifically advises defense counsel of the limited theory of a particular prosecution, and then that prosecutor and the trial court allow an alternative theory in argument. The suggestion of an alternative theory for

criminal responsibility in the criminal proceedings reviewed negates application of the '*Sheppard* rule.' [Citations.]" (*Ardoin*, at p. 132, fn. 12.)

Appellant argues this case falls within the narrowed *Sheppard* rule because the lack of notice involved a "new accusation and a separate victim." We disagree and conclude appellant had adequate notice of the count 3 assault with a firearm charge.

Sheppard is distinguishable. Here, the information gave appellant notice of the count 3 assault of Kaboo with a firearm. The prosecution listed Kaboo as a potential witness. Maes's testimony regarding a second victim was elicited during defense cross-examination and defense counsel made no attempt to object or move to strike that testimony. While the prosecution may have earlier communicated to defense counsel and the court his intention to dismiss the count 3 assault charge, that count had not been dismissed at the time of Maes's testimony. Thus, the prosecutor properly followed up on Maes's unobjected-to cross-examination testimony. Appellant has failed to demonstrate he had inadequate notice of the count 3 assault with a firearm charge.

II. *Appellant Failed to Timely Object to Hearsay Testimony*

Appellant next contends the court erred in overruling defense counsel's belated hearsay objection to Maes's testimony that Kaboo was present at the shooting.

The admissibility of evidence lies within the broad discretion of the trial court. (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718.) "To preserve an evidentiary issue for appeal, the complaining party generally is required to make a timely and meaningful objection in the trial court. (Evid. Code, § 353, subd. (a).) The purpose of this rule 'is to encourage a defendant to bring any errors to the trial court's attention so the court may correct or avoid the errors and provide the defendant with a fair trial.' [Citation.]" (*People v. Carrillo* (2004) 119 Cal.App.4th 94, 101.) Where hearsay evidence is not objected to at the time it is elicited, a hearsay objection first tendered at the close of the prosecution's case is untimely. (See *People v. Panah* (2005) 35 Cal.4th 395, 476 (*Panah*).)

Appellant argues defense counsel's hearsay objection to Maes's testimony, made in conjunction with the motion for acquittal at the close of the prosecution's case, was

timely because it was made at the earliest opportunity after the prosecutor "reinstated the assault charge." He asserts that, at the time Maes testified, defense counsel "could not have foreseen the prosecutor's rescission and the harm Maes's hearsay testimony would cause to appellant's defense," and any earlier objection would have been an idle act.

The record, however, is inconsistent with this contention. First, count 3 had not been dismissed before Maes testified and there was no rescission. Second, during the prosecution's redirect examination of Maes, the prosecutor asked for the identification of the second victim and defense counsel objected, suggesting counsel's awareness and concern this evidence would help establish the elements of count 3. Defense counsel made only a "speculation" objection, which was overruled, and did not object to Maes's testimony on hearsay grounds.

Following Maes's redirect examination, the prosecution called two witnesses. After the direct examination of the second witness (Christopher Vogen), defense counsel asserted that an objection he made during Maes's direct examination testimony had been improperly overruled. The challenged testimony by Maes was unrelated to Maes's testimony regarding Kaboo and to count 3. At no time during that colloquy did defense counsel object to Maes's hearsay testimony regarding Kaboo.

After Vogan was excused, the parties entered stipulations into evidence and the People rested. At that point the court dismissed count 2, the prosecutor argued there was sufficient evidence to support count 3, and defense counsel made his motion for judgment of acquittal. For the first time, defense counsel objected that Maes's testimony regarding Kaboo was inadmissible hearsay; the court impliedly overruled the objection. Thus, defense counsel's belated hearsay objection was not made at the earliest opportunity and the court's implied denial of the hearsay objection was not an abuse of discretion. Defense counsel could have but tactically chose not to tender his hearsay objection at the time of Maes's testimony or at any time prior to the close of the prosecution's case. Failure to comply with the statutory requirement regarding timely evidentiary objections may not be excused on the ground that a timely objection "would be inconvenient or

because of concerns about how jurors might perceive the objection." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1181.)

Hearsay testimony received without objection is competent proof when evaluating the sufficiency of the evidence. (*Panah, supra,* 35 Cal.4th at p. 476.) Contrary to appellant's assertion, Maes's testimony could be considered on the question of whether substantial evidence supported the assault with a firearm charge.

DISPOSITION

The matter is remanded with directions to the trial court to correct the sentencing order and abstract of judgment to reflect that the firearm enhancement attached to count 1 was imposed pursuant to section 12022.53, subdivision (d). The court is directed to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.